IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. SAMUEL ROBERT ENGLISH, Appellant.	No. 37047-6-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — Samuel R. English appeals his conviction for first degree attempted child molestation, arguing that (1) the trial court erred when it precluded Dr. Jerry Larsen from testifying that English's voluntary intoxication prevented him from forming the requisite intent to commit the crime, (2) the trial court erred when it precluded Larsen from testifying that English did not fit the profile of a pedophile, and (3) his counsel was ineffective for failing to object to improper opinion testimony. *State v. Vermillion*, 66 Wn. App. 332, 342, 832 P.2d 95 (1992). *review denied*, 120 Wn.2d 1030 (1993).

Separately, in his statement of additional grounds (SAG),[1] English contends that (1) sufficient evidence does not support his conviction, (2) the trial court erred when it precluded Dr.

[1] RAP 10.10.

Larsen from testifying that English has a 36-year-old girl friend, (3) the trial court erred when it refused to allow English to testify in response to the State's closing argument, (4) his trial counsel was ineffective, and (5) cumulative error denied him a fair trial.

Because none of English's arguments has merit, we affirm.

FACTS

Factual Background

In August 1998, George and Berit Riddle lived in their family home in a rural area outside of Battle Ground, Washington. In mid-August, George[2] and Berit's nine-year-old granddaughter, L.R., travelled from her home in Lakewood, Washington, to stay with them for a few weeks, as she did every summer. Because L.R. was afraid of the dark, her grandparents put a night light at the foot of her bed, as well as two electric "touch" lamps on the night stands on either side of the bed.

On August 17, 1998, approximately one week after L.R. arrived, English called George and Berit. George and Berit had not seen English for approximately six years. English, who holds dual citizenship in the United States and Canada, worked as a long-haul truck driver along Interstate 5 between British Columbia, Canada, and California.[3] English told George and Berit that he had parked his truck on the highway and that he had a delivery in Vancouver, Washington, the next day. Around 4:00 pm, George picked up English at the truck stop where English had parked his truck and brought him home to stay the night before his delivery the next day.

---

[2] We use the Riddles' first names for clarity.

[3] Although English ultimately lived in British Columbia as an adult, he lived in Bellevue, Washington, as a child and remained in the United States until young adulthood. When English lived in Bellevue, he and his family were close friends and neighbors of George and Berit.

On the way home from the truck stop, George and English stopped at a convenience store and purchased a six-pack of beer. From the moment English arrived at George and Berit's home, he drank beer continuously until he went to bed, around 10:00 pm. According to George, English drank approximately 10 or 11 beers over the course of the evening. English also smoked cigarettes continuously throughout that evening. Although neither George nor Berit smoked cigarettes, they allowed English to smoke outside on their back patio.

Around 9:00 or 9:30 pm that evening, Berit put L.R. to bed. When Berit left the room, a night light at the foot of her bed and two "touch" lamps on the night stands on either side of her bed were on, but the overhead light was off. George and Berit eventually went to bed, leaving English on the patio.

At approximately 2:23 am, L.R. woke up Berit and told her that English had been in her room. Berit went with L.R. to L.R.'s bedroom; Berit noticed that the night light was off and that the "touch" lamps had been unplugged from the wall. Berit also noticed a faint odor of cigarettes in the room.

L.R. told Berit that she had been sleeping on her stomach and that she woke up because someone was rubbing her back underneath her shirt. Initially, L.R. explained that she thought her grandmother had come to wake her up. But when L.R. looked at her clock and realized it was 2:23 am, she knew it was not her grandmother and, even though she could not see him in the dark, L.R. recognized English as the person who had been touching her because she smelled the odor of cigarettes and recognized his "raspy" breathing. 4 Report of Proceedings (RP) at 248. L.R. stated that she immediately told English to leave and heard him exit the room and walk down the hallway.

After L.R. told Berit what had happened, Berit took L.R. back to the master bedroom, woke up George, and explained what had occurred. George immediately got dressed and went into the bedroom where English had been staying, but English was not there. George looked for English in the home and noticed a lit cigarette in the ashtray on the patio where English had been smoking and drinking earlier that evening. At about the same time, English walked up to the house from outside and said that he had been pursuing someone whom he had seen running away from the house. As a result of what had transpired, George decided to take English back to his truck.

While George was driving English back to his truck, George decided that they needed to go talk to the police and English agreed. George saw a police officer and a sheriff's deputy conducting a traffic stop in Battle Ground, but George passed these officers and drove to the Battle Ground police station to report the incident. Because no officers were at the station, George returned to the officers conducting the traffic stop and told the officers what had happened that evening.

English explained to Deputy Brent Waddell that he had not molested L.R. and that he had seen a stranger fleeing from George and Berit's home. Waddell did not arrest English at this time and, because George was visibly upset and English was demonstrably intoxicated, Waddell elected to take English back to his truck. After arriving at English's truck, Waddell warned English not to operate his truck until he was sober.

The next day, a deputy sheriff came to George and Berit's home to take statements from them and from L.R. On September 1, 1998, English voluntarily went to the Vancouver Police Department and submitted to an interview with Officer Steven Norton, a Vancouver Police

Officer assigned to the Clark County Child Abuse Intervention Center. Before the interview, Norton read English his *Miranda*[4] rights, which English indicated he understood and would waive. During the interview, English explained that he was an alcoholic who suffered from blackouts and that during the evening that L.R. claimed he had touched her, he had been drinking heavily and had very little memory of what happened that evening. But although English denied molesting L.R. or having any such tendencies, he admitted that he had lied to George and Deputy Waddell about seeing a stranger flee from George and Berit's home.

Procedural History

On September 11, 1998, the State charged English with one count of first degree attempted child molestation. The trial court released English on $10,000 bail. On December 9, 1998, the parties appeared for English's omnibus hearing; at the hearing, English indicated that he intended to assert a claim of diminished capacity. The State indicated that it intended to seek admission of L.R.'s statements to her grandparents under the child hearsay statute, RCW 9A.44.120. Because the State intended to admit evidence under the child hearsay statute, the court ordered the parties to appear for a *Ryan*[5] hearing on January 7, 1999.

On January 7, 1999, English's trial counsel appeared for the *Ryan* hearing and informed the court that English had called him and stated that he would be unable to attend the hearing due to an unavoidable delay because he was on his truck route in California. English indicated that he would be able to appear in court the next day and that he wanted his attorney to proceed with the *Ryan* hearing in his absence. As a result of his conversation with English, English's trial counsel

[4] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[5] *State v. Ryan*, 103 Wn.2d 165, 691 P.2d 197 (1984).

asked the trial court to proceed with the *Ryan* hearing in English's absence and to delay issuing a warrant until English had an opportunity to appear the next day. The trial court granted both requests. At the *Ryan* hearing, L.R., Berit, and George testified about the events in the early morning hours of August 17, 1998. The trial court ruled that L.R.'s statements were admissible under the child hearsay statute as well as under the excited utterance exception to the hearsay rule.

According to English, he met with his attorney, Robert Yoseph, shortly after the *Ryan* hearing and he elected to return to Canada instead of appearing for trial because his attorney "unofficially suggested that [he] was being railroaded and that [he] didn't need to come down because [he] was facing nine years," and the State would not attempt to extradite him in this case.[6] 5 RP at 475. Shortly thereafter, the trial court issued a warrant for English's arrest and ultimately forfeited his bail.

In September 2000, English turned himself in to Canadian authorities based on his outstanding warrant in this matter, and Canadian authorities placed him on supervised release for approximately seven years. On March 12, 2007, English again turned himself in to Canadian authorities; Canadian authorities subsequently transported him to the United States/Canada border, where United States Marshals picked English up.

On April 30, 2007, English appeared in Clark County Superior Court with new counsel.

The Trial

At trial, George testified about the events that occurred on August 17, 1998. He stated

[6] We note that any such advice would violate Washington's Rules of Professional Conduct. RPC 8.4.

that as he was driving English back to his truck, he decided to contact the police because he "realized that [he] had to do something, a crime had been committed," so he told English that he "could go to the police." 4 RP at 327. English's trial counsel did not object. In response to his statement that he could go to police, George testified that English stated "[d]o that, so they could take some fingerprints or whatever." 4 RP at 327.

Detective Norton testified about his investigation of L.R.'s accusations against English. When the State asked Norton his occupation, Norton testified that he was a detective with the City of Vancouver Police Department assigned to the Child Abuse Intervention Center. English's trial counsel did not object. Norton also testified that when English came to submit to an interview, Norton began the interview by reading English his *Miranda* rights. Norton repeated the rights afforded under *Miranda* to the jury. English's trial counsel did not object to either of these statements.

At the close of the State's case, English sought to have Dr. Larsen, a psychiatrist, testify regarding (1) his determination that English was an episodic alcoholic who suffered blackouts during his drinking binges; (2) the fragmentary memory loss associated with blackouts; and (3) the results of his psychosexual evaluation on English, in which Larsen determined that English did not exhibit the tendencies normally associated with pedophilia based on the Minnesota Multiphasic Personality Inventory (MMPI).[7] At this point, the trial court excluded evidence of English's "sexual normalcy," reasoning that it was offered merely to demonstrate that English did not commit this crime, which encompasses the ultimate issue of the case.

[7] The MMPI is one of the most frequently used personality tests in mental health; trained professionals use this test to help them identify an individual's personality structure and psychopathology.

In his offer of proof, Dr. Larsen stated that alcohol is a disinhibiting agent that also interferes with the transmission of impulses through the hypothalamus into the neocortex, thereby preventing memories from implanting into the frontal areas of the brain. Larsen indicated that there are two types of blackouts: total memory loss and fragmented memory loss. Fragmented memory loss is far more common and, when experiencing fragmentary memory loss, an individual will remember only bits and pieces of the events. And, according to Larsen, English's account of the events on the night of the incident was consistent with such a blackout.

In addition, Dr. Larsen stated that, although memory impairment from excessive alcohol use has been recognized and generally accepted by the scientific community and studied for years, no such testing has been done as it relates to the capacity to form intent following excessive alcohol consumption. Instead, Larsen stated several times that he was not suggesting that individuals who are in a blackout state cannot form intent; to the contrary, he confirmed that individuals who are in a blackout state can, and do, act intentionally. And he reiterated that while he believed English suffered an alcohol-induced blackout on the night of the incident, he was not suggesting that English lacked the capacity to commit the crime.

Following English's offer of proof, the trial court permitted Dr. Larsen to testify regarding blackouts as a result of alcoholic binge drinking, but it precluded Larsen from testifying about the effect of an alcoholic blackout on an individual's ability to form the requisite intent to commit a crime because it did not meet the required evidentiary standard. Larsen testified on cross-examination that an individual who suffers from an alcohol-induced blackout can act intentionally, meaning that they acted with the "objective or purpose to accomplish a result which constitutes a crime," but that such an individual may not understand what they are doing. 5 RP at 452.

The jury found English guilty of first degree attempted child molestation. English timely appealed.

ANALYSIS

Dr. Larsen's Testimony

English claims that the trial court erred when it prevented him from being able to present relevant, exculpatory evidence in support of his diminished capacity defense, in violation of his right to due process. Specifically, English argues that the trial court erred when it precluded Dr. Larsen from testifying about English's "claim that his voluntary intoxication had prevented him from forming the requisite intent to commit a crime." Br. of Appellant at 15. English also argues that the trial court erred when it excluded evidence about English's "sexual normalcy" under the MMPI. We disagree.

A. Ability To Form Intent During an Alcohol-Induced Blackout

English first contends that the trial court erred when it refused to allow Dr. Larsen to testify regarding the effects of alcohol-induced blackouts on an individual's ability to form the requisite intent to commit a crime. Specifically, English argues that the exclusion of this evidence prevented him from being able to present a defense. But the trial court did not abuse its discretion when it refused to permit Larsen to testify regarding the effect that alcohol-induced blackouts have on the ability to form intent because Larsen could not offer an opinion that English lacked the capacity to form the intent to commit a crime.

A trial court has considerable discretion regarding the admissibility of both lay and expert testimony, and we will uphold the trial court's decision unless it is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *State v. Stumpf*, 64 Wn. App. 522, 527,

827 P.2d 294 (1992). For expert testimony to be admissible on the issue of voluntary intoxication or diminished capacity, "'the evidence must reasonably and logically connect the defendant's intoxication with the asserted inability to form the required level of culpability to commit the crime charged.'" *State v. Guilliot*, 106 Wn. App. 355, 366, 22 P.3d 1266 (quoting *State v. Gabryschak*, 83 Wn. App. 249, 252-53, 921 P.2d 549 (1996)), *review denied*, 145 Wn.2d 1004 (2001). "'It is not the fact of intoxication that is relevant, but the degree of intoxication and the effect it had on [English's] ability to formulate the requisite mental state.'" *Guilliot*, 106 Wn. App. at 366 (quoting *Gabryschak*, 83 Wn. App. at 252); *see also State v. Everybodytalksabout*, 145 Wn.2d 456, 479, 39 P.3d 294 (2002) (in a voluntary intoxication defense, the defendant must demonstrate that intoxication affected his ability to acquire the required mental state).

Here, because numerous witnesses testified about English's level of intoxication, the trial court instructed the jury on voluntary intoxication. Jury instruction number 11 stated that "[n]o act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant acted with intent." 1 Clerk's Papers at 113.

English argues that this instruction "begs the questions (1) whether or not intoxication, including alcohol intoxication, can interfere with a defendant's mental capacity to form a specific intent, and (2) how it is that alcohol intoxication interferes with the formation of a mental intent." Br. of Appellant at 18. As a result, English argues that it was "critical for [him] to present expert testimony that alcohol intoxication can affect a person's capacity to form a specific intent." Br. of Appellant at 18. During his offer of proof, Dr. Larsen discussed in detail the effects of alcohol as it relates to blackout and fragmentary memory loss. But while Larsen stated that English's

version of events was consistent with an alcohol-induced blackout with fragmentary memory loss, Larsen specifically clarified that an individual in a blackout state can still act intentionally and that he was not suggesting English lacked the capacity to form intent as a result of his blackout state.[8]

Thus, the trial court properly determined that Dr. Larsen's proffered testimony about an individual's ability to form intent during an alcohol-induced blackout was inadmissible to prove diminished capacity due to involuntary intoxication. First, it was irrelevant under ER 401[9] and, second, it was unhelpful under ER 702.[10] Despite English's assertion to the contrary, this evidence was irrelevant under ER 401 because, in order to be relevant to the defense of involuntary intoxication, Larsen needed to testify that English lacked the capacity to form the intent to commit the crimes. Moreover, his testimony was inadmissible under ER 702 because for expert testimony to be admissible on the issue of voluntary intoxication, "'the evidence must reasonably and logically connect the defendant's intoxication with the asserted inability to form the required level of culpability to commit the crime charged.'" *Guilliot*, 106 Wn. App. at 366 (quoting *Gabryschak*, 83 Wn. App. at 252-53). And Larsen specifically refused to offer an

---

[8] During the offer of proof, Dr. Larsen was asked the following question: "Well, first of all, are you drawing a comparison or an analogy between being in a blackout state and the ability to form intent"? 5 RP at 410. To which Larsen replied, "No." 5 RP at 410. "So, you're not here to say this man could not form intent because he was in a blackout?" 5 RP at 410. And Larsen replied, "Correct." 5 RP at 410.

[9] ER 401 states: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

[10] ER 702 states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

opinion that English lacked the capacity to commit the crime based on his blackout state.

B. Evidence of English's "Sexual Normalcy"

English argues that the trial court erred when it excluded evidence of his "sexual normalcy." Specifically, English contends that the trial court erred when it excluded evidence that English did not display the traits consistent with those of a pedophile under the MMPI. Because character evidence cannot be offered in the form of an opinion, the trial court properly excluded this evidence.

Generally, evidence of a person's character is inadmissible, but a criminal defendant may present evidence of a "pertinent trait of character." ER 404(a)(1). And Washington courts have held that "sexual morality" is a pertinent character trait in cases involving sexual offenses. *State v. Woods*, 117 Wn. App. 278, 280, 70 P.3d 976 (2003) (citing *State v. Griswold*, 98 Wn. App. 817, 829, 991 P.2d 657 (2000), *abrogated on other grounds by State v. DeVincentis*, 150 Wn.2d 11, 74 P.3d 119 (2003)), *review denied*, 151 Wn.2d 1012 (2004). But although evidence of a pertinent character trait may be relevant and admissible, the method of introducing such evidence is limited. Such character evidence must be based on the defendant's reputation in the community; a witness's opinion is not admissible as proof of character. ER 405; *Woods*, 117 Wn. App. at 280 (citing *State v. Kelly*, 102 Wn.2d 188, 195, 685 P.2d 564 (1984)); *see also* ER 405(a). Thus, in order to admit such reputation testimony, a defendant must establish both that the character witness is familiar with the defendant's community and that the witness's testimony is based on the community's perception of that person with regard to the character trait. *State v. Callahan*, 87 Wn. App. 925, 935, 943 P.2d 676 (1997). The personal opinion of an expert witness as to the defendant's sexual character is not admissible. *See, e.g.*, *Kelly*, 102 Wn.2d at 195.

Here, English did not seek to admit Dr. Larsen's expert testimony in order to establish English's character for sexual morality in the general community but, rather, he sought to have Larsen testify as to his personal opinion about whether he believed English fit the profile of a pedophile. This is not admissible character evidence. *See Woods*, 117 Wn. App. at 280 (despite relevance of "sexual morality," doctor's testimony that the defendant was not sexually impulsive and was not predisposed to pedophilia was inadmissible opinion evidence of defendant's sexual character). In light of Washington's rule that opinion evidence is not admissible as proof of character, the trial court properly excluded Larsen's testimony regarding English's sexual normalcy.

Ineffective Assistance of Counsel

English next claims his trial counsel was ineffective for failing to object to improper opinion testimony. Specifically, English contends that his trial counsel was ineffective because she failed to object to (1) George's testimony that he believed "a crime had been committed," (2) Officer Norton's testimony that he worked for the Child Abuse Prevention Center, and (3) Norton's testimony that he read English his *Miranda* rights and then read those rights into the record. Because English's trial counsel's failure to object to George's testimony can be attributed to a legitimate trial strategy and English cannot demonstrate that Norton's testimony resulted in any prejudice, English's trial counsel was not deficient.

A. Standard of Review

The federal and state constitutions guarantee effective assistance of counsel. *See* U.S. Const. amend VI; Wash. Const. art. I, § 22. To prove ineffective assistance of counsel, the appellant must show that (1) counsel's performance was deficient and (2) that deficient

performance prejudiced him. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Counsel's performance is deficient when it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have been different. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). There is a strong presumption that counsel was effective and counsel's conduct cannot support a claim of deficient performance if we can characterize it as a legitimate trial strategy or tactic. *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978).

Counsel's choice of whether to object is a classic example of trial tactics and, only in egregious circumstances, on testimony central to the State's case, will failure to object constitute incompetence of counsel, justifying reversal. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Ermert*, 94 Wn.2d 839, 849, 621 P.2d 121 (1980)), *review denied*, 113 Wn.2d 1002 (1989). To demonstrate ineffective assistance of counsel based on the failure to object, the defendant must show (1) that the trial court would have sustained the objection if raised, (2) an absence of legitimate strategic or tactical reasons for failing to object, and (3) that the result of the trial would have been different. *See State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998) (citing *State v. McFarland*, 127 Wn.2d 322, 336-37, 899 P.2d 1251 (1995); *State v. Hendrickson*, 129 Wn.2d 61, 80, 917 P.2d 563 (1996)).

It is improper for a witness to express a personal opinion regarding the guilt of the accused. *State v. Garrison*, 71 Wn.2d 312, 315, 427 P.2d 1012 (1967). Such impermissible opinion testimony about a defendant's guilt may constitute reversible error because it violates the

defendant's constitutional right to a jury trial, which includes an independent determination of the facts by the jury. *State v. Kirkman*, 159 Wn.2d 918, 935-37, 155 P.3d 125 (2007). In order to determine whether statements constitute impermissible opinion testimony, we consider the circumstances of the case, including: (1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact. *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001) (quoting *City of Seattle v. Heatley*, 70 Wn. App. 573, 577, 854 P.2d 658 (1993), *review denied*, 123 Wn.2d 1011 (1994)).

B. George's Testimony

English argues that his counsel was ineffective for failing to object to George's testimony that he drove English to the Battle Ground police station and then back to the officers conducting a stop on the highway because George believed "a crime had been committed." 4 RP at 327. At the time, there was no dispute that someone had touched L.R. sexually. English had told George that he had seen someone coming from inside the house and suggested that that individual had committed a crime inside the home. George's stated belief that "a crime had been committed" does not amount to a statement that English is guilty. English's trial counsel's decision not to object was a legitimate and intentional decision not to emphasize innocuous evidence. *See State v. Hunter*, 29 Wn. App. 218, 223, 627 P.2d 1339 (1981).

C. Child Abuse Prevention Center

English next contends his counsel was ineffective for failing to object to Officer Norton's testimony that Norton had been assigned this particular case because he worked with the "Child Abuse Intervention Center." Br. of Appellant at 27. Specifically, English argues that Norton's

testimony was an improper comment on English's guilt because "were [English] not guilty of child sexual abuse, [Norton] would not have been assigned to the case." Br. of Appellant at 27. Even if Norton's assignment suggests that some form of sexual abuse may have occurred, it does not suggest the identity of any perpetrator; as an investigator, Norton is assigned to cases in which there is an *allegation* of child sexual abuse, not only those cases where abuse has actually occurred. Norton's testimony did not constitute an improper opinion on English's guilt and English's trial counsel was not deficient in failing to object.

D. *Miranda*

English argues that Officer Norton's testimony that he read English his *Miranda* rights and then read those rights into the record is an impermissible comment on English's guilt because "had [English] not been guilty of the crime, there would have been no need for Officer Norton to inform [English] of his . . . *Miranda* rights." Br. of Appellant at 27. But even assuming that English's trial counsel should have objected and that such an objection would have been sustained, both of which seem highly unlikely, English cannot demonstrate prejudice. English's argument also overlooks the fact that officers are required under the constitution to read *Miranda* rights to all individuals who are subject to custodial police interrogation, regardless of the officer's personal opinion as to that individual's guilt and regardless of whether that individual actually committed the crime for which he or she is being questioned. *See State v. France*, 129 Wn. App. 907, 910, 120 P.3d 654 (2005) (individuals subject to custodial interrogation must be read their rights under *Miranda*). In addition, although English ultimately testified that his statements to Norton were voluntary and knowing, the State could not know that English would not repudiate the willingness of his statements during the defense's case, and English made much

of his willingness to cooperate voluntarily with the investigation.

Statement of Additional Grounds

A. Sufficiency of the Evidence

English further argues that sufficient evidence does not support his conviction. English appears to argue that his conviction cannot stand because the only evidence against him are L.R.'s statements, which are "uncorroborated," and an "[u]ncorroborated confession/[s]tatement [by a victim] is insufficient evidence to sustain a conviction." SAG at 3. We disagree. Berit's testimony that she saw both "touch" lamps and the night light were unplugged and she smelled cigarette odor corroborated L.R.'s testimony that someone had been in her room that night. But L.R.'s testimony, if found credible by the jury, need not be corroborated. *See* RCW 9A.44.020.[11] The jury heard L.R.'s testimony and chose to believe her, and the jury heard English's testimony and chose not to believe him. And we defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992). Furthermore, circumstantial evidence is as probative as direct evidence. *Vermillion*, 66 Wn. App. at 342.

B. Sexual Normalcy

English argues that the trial court erred when it refused to allow Dr. Larsen to testify that English "had a girlfriend, 36 years old[,] and has had normal relationships [t]hroughout his life." SAG at 4. But as shown above, Larsen's testimony regarding English's sexual normalcy was inadmissible character evidence; moreover, Larsen's offer of proof did not include information about English's past sexual relationships or information about his current relationship.

[11] RCW 9A.44.020(1) states: "In order to convict a person of any crime defined in [ch. 9A.44 RCW] it shall not be necessary that the testimony of the alleged victim be corroborated."

C. English's Flight

English argues that the trial court erred by allowing the State, during its closing argument, to comment on English's flight to Canada as evidence of English's "[c]onsciousness of guilt." 5 RP at 521. Although English's argument is unclear, it appears he is arguing that he should have been permitted to testify in response to the State's closing argument. But although English could not testify after the State's closing argument since both the State and the defense had rested, his trial counsel had the opportunity to respond to the State's comments during its own closing argument. Moreover, there was a basis for the State's argument since English had testified about why he had chosen to return to Canada instead of facing trial and evidence of flight is probative of a defendant's consciousness of guilt. *See State v. Hebert*, 33 Wn. App. 512, 515, 656 P.2d 1106 (1982).

D. Ineffective Assistance of Counsel

Next, English argues that his trial counsel was ineffective when, during closing arguments, she said that after the incident, "[L.R.] said she was crying hysterically. And I can believe that." 5 RP at 527. Although his argument is unclear, it appears that English is arguing that his trial counsel caused him prejudice by misstating this fact. While L.R. testified at trial she cried when she told her grandmother that she awoke to English rubbing her back, 10 years earlier at the *Ryan* hearing, she stated that she did not cry. Thus, English's trial counsel's statement accurately reflected L.R.'s testimony at trial but not her statements at the *Ryan* hearing. To the extent English is arguing that his attorney should have pointed out this discrepancy during closing arguments, he fails to articulate how this discrepancy prejudiced him.

English also contends that his trial counsel was ineffective when, during closing

arguments, she stated that she "can believe" that L.R. was crying hysterically the night of the incident, impermissibly vouching for L.R.'s credibility. 5 RP at 527. But the crux of English's defense was that he did not intend to touch L.R. in a sexual manner and that the touching L.R. described was non-sexual in nature. Here, it appears that English's attorney was merely trying to acknowledge that it was scary for a nine-year-old girl to awake to a stranger touching her even if, as English's trial counsel argued, that touching was non-sexual in nature. And treating a child victim sympathetically is a legitimate trial tactic. *See Adams*, 91 Wn.2d at 90.

Next, English contends that his counsel was ineffective when, during closing arguments, his trial counsel stated that Deputy Waddell advised English not to drive after Waddell dropped English off at English's truck because the "last thing you need is another crime on your watch, another allegation." SAG at 15. Specifically, English contends that his trial counsel's statement implies that English was guilty. But English's trial counsel was merely summarizing Waddell's testimony, which is permissible during closing arguments, and emphasizing English's level of intoxication, which was also central to his trial strategy. *See Adams*, 91 Wn.2d at 90.

E. Cumulative Error

Lastly, English argues that cumulative error denied him a fair trial. We disagree. The cumulative error doctrine applies when several errors occurred at the trial court level but none alone warrants reversal. *State v. Hodges*, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003), *review denied*, 151 Wn.2d 1031 (2004). Instead, the combined errors effectively denied the defendant a fair trial. *Hodges*, 118 Wn. App. at 673-74. The defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835, 870 P.2d 964, *cert. denied*, 513 U.S. 849 (1994).

Numerous errors, harmless standing alone, can deprive a defendant of a fair trial. *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). But here, there are no errors, accumulated or standing alone, that warrant reversal.

Accordingly, we affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

VAN DEREN, C.J.

PENOYAR, J.